Federal Court  Cour fédérale

Date: 20190222

Docket: T-2010-17

Citation: 2019 FC 221

Toronto, Ontario, February 22, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

JOCELYN CÉRÉ

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Céré is seeking judicial review of a decision of the Government of Canada Pension Centre, which refused to recognize the existence of an employment relationship between Mr. Céré and the government between 1984 and 1995 and thereby denied Mr. Céré's entitlement to a pension for the work he carried out during those years. I find that the Pension Centre's decision was unreasonable, since the Centre completely perverted the test for determining whether there was, in fact, a genuine employment relationship.

I. Factual and legal background

[2] For a proper understanding of this case, I will start by giving an outline of the statutory scheme for pensions in the public service. I will then describe the facts that gave rise to this dispute, followed by the steps taken by Mr. Céré to be granted a pension.

A. *The public service pension plan*

[3] Parliament enacted the *Public Service Superannuation Act*, RSC 1985, c P-36 [the PSSA], to establish a pension plan [the plan] for the various categories of employees within the federal public service. The PSSA does not only cover public servants appointed under the *Public Service Employment Act*, SC 2003, c 22 [the PSEA], that is, mainly employees of government departments, but also the employees of a wide range of agencies that are not part of the "public service" strictly speaking and that have their own hiring authority. The plan is for both unionized and non-unionized employees.

[4] Employees subject to the plan are required to make a contribution deducted from their salary. The employer, be it the federal Crown or another agency, also has to make a contribution for each participating employee. For the purposes of this case, there is no need for a more detailed description of the plan.

[5] The obligation to contribute to the plan is usually triggered when a person begins an eligible employment. However, the PSSA provides for the option of making a retroactive contribution in a number of situations. The only situation that might apply to this case is the one

that arises from the combined effect of divisions (B) and (K) of subparagraph 6(1)(b)(iii) of the PSSA, namely "any period of service before becoming a contributor . . . during which he was employed in the public service". This provision contemplates a situation where a person was, for some reason, an employee *de facto*, but was not contributing to the plan.

[6] The PSSA does not provide for a specific mechanism for resolving disputes or determining entitlement to the plan. It is therefore the role of the Government of Canada Pension Centre [the Pension Centre], which is part of the Department of Public Works and Government Services, to dispose of such issues.

B. *Mr. Céré's employment*

[7] The David Florida Laboratory [the Laboratory] is a spacecraft assembly and testing centre that belongs to the Government of Canada. Over the years, the Laboratory has developed an international reputation in this field. Initially part of the Department of Communications, the Laboratory was later integrated into the Canadian Space Agency. Both the Department and the Agency are covered by the PSSA.

[8] Between 1983 and 1995, Mr. Céré contributed to the Laboratory's work as a technologist in the Thermal Vacuum Facility. His role consisted of ensuring the smooth running of various equipment used to test the operation of satellite components and other space equipment in pressure and temperature conditions simulating those found in space.

[9] However, throughout his collaboration with the Laboratory, Mr. Céré did not occupy a position that was created and staffed in accordance with the PSEA. It seems that, at various times in its history, the Laboratory preferred asking certain private companies with which it had dealings to provide it with staff rather than creating and staffing positions under the PSEA. This approach had allowed the Laboratory to respond more quickly to the rapid growth in demand for its services. During the relevant period, therefore, the Laboratory staff was made up of both persons appointed under the PSEA and persons whose services were supplied through private companies. In the Laboratory's day-to-day affairs, however, no distinction was made between the two categories.

[10] It was the managers of the Laboratory who interviewed Mr. Céré and who decided to hire him. However, instead of appointing him under the PSEA, they put Mr. Céré in touch with a private employer, initially Ottawa Mouldcraft Ltd., for the 1983–1984 period, and subsequently Calian Technology Ltd., for the 1985–1995 period. The private employer hired Mr. Céré and made his services available to the Laboratory.

[11] It is undisputed that Mr. Céré was a fully integrated member of the Laboratory team, be it professionally or, more generally, socially. He received his instructions and training from Laboratory managers. The Laboratory provided him with everything he needed for his work, from his uniform to his work tools, including stationery, his desk and a telephone. To Laboratory clients, Mr. Céré was identified as an employee; on occasion, he represented the Laboratory in discussions with clients. He participated in the social events organized by Laboratory employees.

[12] Even though he received his salary from Ottawa Mouldcraft Ltd. or Calian Technology Ltd., Mr. Céré had no interaction with these companies as part of his work; they did not give him any instructions or supervise his work. His salary was based on public service pay scales and he had the same leave. He only spoke with Ottawa Mouldcraft Ltd. or Calian Technology Ltd. representatives once or twice a year to discuss his salary increases.

[13] The Pension Centre found some of the contracts between Calian Technology Ltd. and the Department of Supply and Services. These contracts are very similar, and the differences are not material for the purposes of this case. We may assume that similar contracts covered the entire period during which Mr. Céré worked at the Laboratory. Mr. Céré is not named in these contracts. However, they mention the position of "junior thermal vacuum technologist" that Mr. Céré occupied. It is therefore reasonable to presume that Mr. Céré's services were provided to the Laboratory under such contracts.

[14] Generally speaking, these contracts stipulate that the contractor will supply mechanical, electronic and electrical support services and other technical services to help the Laboratory carry out certain specific projects. These services were provided when the Laboratory requested them. Payment was based on a fee schedule specifying the daily rate applicable to the various categories of employees and the applicable rates for overtime. This manner of calculating the contractor's compensation, combined with the lack of a precise description of the work to be carried out, demonstrates that these were contracts for the supply of personnel. Indeed, under the heading "Scope of Work", the contract dated September 30, 1991, provides that the contractor has to "provide personnel to support testing of spacecraft, satellite subsystems and components

during space simulation . . .". The method for calculating compensation does not allow the contractor to make a profit and does not present a material risk of loss to the contractor.

[15] Mr. Céré left the Laboratory in June 1995. He became an employee of the public service in October 1997 and has occupied various positions since. He has also contributed to the plan since that time.

C. *Mr. Céré's efforts and the Pension Centre's decision*

[16] As soon as he was hired by the public service in 1997, Mr. Céré inquired about the possibility of buying back his years of service at the Laboratory, to no avail. He contacted the Pension Centre in 2010 and again received a negative reply. In 2014, after learning that a person who had worked at the Laboratory in similar circumstances had been able to buy back his service, he submitted a new application and stepped up his efforts.

[17] On June 15, 2015, the Pension Centre acknowledged receipt of Mr. Céré's application and asked him to send some further information. The letter contained the following statement:

> [TRANSLATION]
>
> As a rule, contract service is not countable under the PSSA; however, when it is determined that an employer/employee relationship existed during the period of contract employment, the service may be recognized as public service.

[18] In September 2016, Mr. Céré provided the requested information, including an affidavit of two of his superiors at the Laboratory.

[19] It was not until November 30, 2017, that the Pension Centre made the decision that is the subject of this judicial review. In this decision, the Pension Centre refused to recognize the existence of an employer/employee relationship between 1983 and 1994; however, it recognized such a relationship between January 1, 1995, and June 30, 1995. I will analyze this decision in detail below.

[20] It goes without saying that the decision rendered by the Pension Centre has a significant impact on when Mr. Céré can retire and on how much he will receive as a pension.

[21] Mr. Céré is seeking judicial review of the Pension Centre's negative decision.

II. Analysis

[22] To resolve this dispute, I must first describe the method the courts use to determine whether an employment relationship exists despite the formal legal framework established by the parties. I will then examine whether this method may be applied to the public service, in the context of pensions. I will then demonstrate that the Pension Centre's decision regarding Mr. Céré was unreasonable.

A. *The employment relationship and the concept of "de facto employee"*

[23] Be it in civil or common law, employment contracts are subject to a particular set of rules. These rules usually protect the employee in a context of unequal power relations with the employer. They are also designed to recognize the importance of work for a person's wellbeing,

as noted by Chief Justice Dickson of the Supreme Court of Canada in the *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at page 368:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

[24] To fulfill their protective function, many of the rules pertaining to employment contracts are mandatory or public order rules, which means that the parties to the contract cannot agree to disregard them.

[25] People often provide services to a company or an organization not through an employment contract but a contract for services. Conceptually, this means that a person is selling a service rather than becoming an employee. It would be futile to attempt to enumerate or categorize the situations in which parties choose to conclude a contract for services. Indeed, the contemporary transformations of the labour market mean that contracts for services are increasingly common.

[26] In some cases, there are legitimate reasons for choosing a contract for services. In other cases, however, this choice is made merely to evade certain obligations arising from an employment contract. However, when these obligations are of public order, allowing parties to substitute a contract for services for an employment contract amounts to giving them a *carte blanche* to circumvent the law. In order to avoid such an outcome, the courts will scrutinize the relationship described by the parties as a contract for services to verify whether, in fact, it is actually a contract of employment. This means that it is the courts' role to characterize the

relationship between the parties and to determine whether there is an employment relationship or, in other words, whether a person may be considered to be a "de facto employee" (for a general discussion, see Innis Christie, *Employment Law in Canada*, 4th ed by Peter Barnacle (Toronto: LexisNexis, loose-leaf), Chapter 2 [Christie, *Employment Law*]). Legislatures have on occasion followed suit and provided that, in certain circumstances, a contractor has to be treated as an employee (see, for example, the definitions of "employer" and "worker" in the *Occupational Health and Safety Act*, RSO 1990, c O.1, s 1).

[27] Over time, the courts have developed a test for determining whether a given relationship is more reflective of a contract for services or a contract of employment, or, in other words, whether there is an employment relationship. This test is described slightly differently from one decision to the next. The differences, which are minor overall, are not relevant here. It is enough to cite the summary given by the Supreme Court of Canada in *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59 at paragraph 47, [2001] 2 SCR 983 [*Sagaz*]:

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[28] I will call this test the "private law test", even though it can also be applied in situations that fall more under public law.

[29] The courts also consider that the application of this test has to take into account the purpose of the statute at play. A relationship may therefore be characterized as an employment relationship for some purposes and as a contract for services for other purposes (Christie, *Employment Law* at paragraph 2.2). In this regard, Justice Charles Hackland of the Superior Court of Justice of Ontario recently wrote the following in *Azur Human Resources Ltd v The Minister of Revenue*, 2018 ONSC 5212 at paragraph 24:

> In my view it is entirely possible, depending on the factual and statutory matrix, to conclude that a placement agency is an employer for taxation purposes, but not necessarily for labour relations purposes. Labour and employment statutes are directed toward protection of workers in the workplace, which the employer normally controls. In contrast, in regard to a revenue generating payroll tax, payable by employers, the employer may well be the entity that is contractually mandated to administer the payroll.

[30] Other decisions illustrate the fact that the courts may characterize the same situation differently, depending on the statute that they are applying: *Public Service Alliance of Canada v Parks Canada Agency*, 2009 PSLRB 176 at paragraph 76, affirmed by *Public Service Alliance of Canada v Canada (Attorney General*), 2010 FCA 305; *Estwick v Canada (Attorney General)*, 2007 FC 894 at paragraph 92.

[31] The facts in this case took place entirely in Ontario. The private law principles that may be useful for resolving this dispute must therefore be drawn from the common law, rather than the civil law. That said, there is substantial overlap between civil and common law criteria used to determine the existence of an employment relationship. On that issue, civil law judgments often cite common law precedents and vice versa. It is true that, since the enactment of the *Civil Code of Québec*, greater importance is given to the relationship of subordination expressly

mentioned at article 2085 (see, for example, *Agence Océanica inc c Agence du revenu du Québec*, 2014 QCCA 1385). As we shall see later, this specificity is not determinative here.

B. *The public service and* de facto *employees*

[32] Employment in the public service is governed by a set of specific rules. Some of those rules take their historical origin from the special status of the Crown. Other principles appeared more recently and are associated with the public service's specific role in Canadian society. Among other things, the preamble to the PSEA highlights the need for the public service to be non-partisan, based on merit and representative of Canada's diversity. The rules governing collective labour relations in the public service are different from those in the private sector, for reasons that include the government's historical reluctance to be subject to ordinary law, the need to adjust these rules to the above-mentioned specificities of the public service or the need to ensure delivery of essential services.

[33] In several cases, in order to respect these specific features of the public service, the courts have ruled that public service employment legislation excludes the application of private law principles concerning the employment relationship. One particularly relevant case is *Canada (Attorney General) v Public Service Alliance of Canada*, [1991] 1 SCR 614 [*Econosult*]. After the government decided to privatize educational programs in federal penitentiaries, it contracted with Econosult, a private company, for the provision of teaching services in a penitentiary. A union applied for a declaration that Econosult employees were actually public servants and were part of an employee group for which it was the certified bargaining agent under the *Public Service Staff Relations Act*, RSC 1970, c P-35, which was in force at the time. In essence, the

union was asking the Court to disregard the characterization given by the parties to their contract and to focus on the facts to determine whether there was an employment relationship. The Supreme Court, per Justice Sopinka, declined that invitation as follows:

> In the scheme of labour relations which I have outlined above there is just no place for a species of *de facto* public servant who is neither fish nor fowl. The introduction of this special breed of public servant would cause a number of problems which leads to the conclusion that creation of this third category is not in keeping with the purpose of the legislation when viewed from the perspective of a pragmatic and functional approach. (p 633)

[34] At the hearing of this application, I expressed my concerns regarding the implications of *Econosult*. It will be recalled that, in the letter dated June 15, 2015, the Pension Centre stated that it was prepared to examine whether there was a genuine employment relationship to determine entitlement to a pension. I questioned whether the Centre had adopted a method of analysis that ran against the rule laid out by the Supreme Court in *Econosult*. My concerns were even more pressing given the fact that, in two cases recently brought before our Court, the Attorney General had specifically argued that *Econosult* prevented the Pension Centre from examining whether there was a *de facto* employment relationship (*Baribeau v Canada (Attorney General)*, 2015 FC 615 [*Baribeau*]; *Landriault v Canada (Attorney General)*, 2016 FC 664 [*Landriault*]). I therefore asked the parties to make additional submissions in this regard. Given that, in the letter dated June 15, 2015, the Pension Centre did not explain the basis for its policy, it is appropriate that the Attorney General did so in the submissions he made to the Court (*Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at paragraph 68, [2015] 3 SCR 147). Having read those submissions, I am now satisfied that the Pension Centre did not disregard the Supreme Court's directives.

[35] In essence, the Attorney General stated that the PSSA has different objectives from those of the PSEA and that the former applies to a larger set of employees than the latter. Thus, the principles stemming from *Econosult* should apply only in the context of labour relations and cannot be transposed into the field of pensions. The Attorney General, supported by Mr. Céré in this respect, also argued that some later decisions of the Federal Court of Appeal and our Court that applied *Econosult* were rendered in a context that can be distinguished from the one in this case.

(1) Binding precedent and judicial review

[36] Both our Court and administrative tribunals must follow binding precedents (regarding administrative tribunals, see *Tan v Canada (Attorney General)*, 2018 FCA 186 at paragraph 22). However, the issue I must resolve is not whether I consider myself to be bound by *Econosult* and subsequent decisions of the Federal Court of Appeal or whether those judgments determine the outcome of this case. On judicial review, our Court reviews the Pension Centre's decisions based on the reasonableness standard (*Landriault* at paragraph 16). Accordingly, I must instead ask myself whether the Pension Centre reasonably applied the doctrine of binding precedent to the issue of whether it could determine the existence of an employment relationship based on all of the circumstances of the case.

[37] What does it mean to reasonably apply the doctrine of binding precedent?

[38] The doctrine of binding precedent (or *stare decisis* in Latin) means that a court is bound to apply a rule that is deduced from a decision rendered by a court that is higher in the judicial

hierarchy, provided that the facts and the legal context of both matters are sufficiently similar. An appellate court is also bound, in the same circumstances, to follow its own decisions. However, a court is not bound to follow a precedent if a distinction can be drawn between the facts or the legal context of the matter before it and those that gave rise to the precedent (Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008) at pages 112–115; Bryan A. Garner et al, *The Law of Judicial Precedent*, St. Paul, MN: Thomson Reuters, 2016) at pages 92–104).

[39] The existence of relevant distinctions that make it possible to disregard a precedent is an issue on which reasonable persons may disagree. Of course, in certain cases there will be only one possible answer. For example, if the Supreme Court decided how a certain statutory provision must be interpreted, the administrative tribunal responsible for applying that statute must follow that interpretation. If it disregards it, it would then be said that it applied the "wrong test", and its decision would be considered unreasonable (see, for example, *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at paragraph 37, [2012] 2 SCR 345; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paragraph 194, [2013] 1 SCR 467).

[40] However, we often seek to apply a precedent to a situation that differs in some respects from that which gave rise to the precedent. To determine whether it is mandatory to follow the precedent, we must then assess whether the distinction that may be drawn with the circumstances that gave rise to the precedent affects the reasoning followed by the court that established the precedent to such an extent that a different solution is warranted. To assess whether the

distinctions are sufficiently significant, one can ask, among other things, whether the policy considerations behind the precedent are still present (see, for example, *Childs v Desormeaux*, 2006 SCC 18 at paragraphs 17−23, [2006] 1 SCR 643); whether the statutes at issue have similar or different objectives (see, for example, *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at pages 342–344); or whether, despite their similar wording, they are part of different legislative contexts (see, for example, *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 22, [2015] 2 SCR 179). However, the decision-maker must use his or her judgment to assess these potential differences. In many cases, there could reasonably be differences of opinion regarding the relevance of such a distinction and, in turn, regarding the specific scope of the precedent. For example, courts in different provinces have adopted divergent positions on the application of the test laid out in *RJR – Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, to mandatory interlocutory injunctions. It took a subsequent decision of the Supreme Court to resolve the controversy: *R v Canadian Broadcasting Corp*, 2018 SCC 5, [2018] 1 SCR 196.

[41] Thus, when a decision is reviewed on the reasonableness standard, deference must be shown to decisions made by an administrative tribunal as to whether a precedent is binding or can be distinguished. The reviewing court must not decide whether a precedent applies or not. Rather, we must determine whether the reasons given by the administrative tribunal in order to apply or disregard the precedent were reasonable. To use the words of *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190, those reasons must be transparent and intelligible and the decision must fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and law.

[42] An additional difficulty arises with respect to the binding authority of a judgment that, on judicial review, rules on the reasonableness of an administrative decision. If the reviewing court rules that the administrative decision-maker's interpretation of a statute is unreasonable and that decision-maker used the same interpretation in a subsequent decision, clearly, the second decision would be as unreasonable as the first. In that case, it is unreasonable not to follow the precedent established by the reviewing court.

[43] However, when a reviewing court finds that an administrative decision-maker adopted a reasonable interpretation of a statute, that does not rule out that a different interpretation could also be reasonable (see, for example, *McLean v British Colombia (Securities Commission)*, 2013 SCC 67 at paragraph 37, [2013] 3 SCR 895). In that case, the reviewing court's decision has much lower precedential value, in that it could be reasonable to adopt a different interpretation from the one that was originally deemed to be reasonable.

(2) Did the Pension Centre reasonably conclude that it was not bound by *Econosult*?

[44] *Econosult* established that private law principles cannot be used to recognize a *de facto* employment relationship for the purposes of the collective labour relations regime in the public service. Should this rule be extended to the pension plan created by the PSSA?

[45] First of all, I note that *Econosult* itself does not dictate one single answer to this question. The reasons for the Supreme Court's decision are closely tied to the structure of the statutes governing collective labour relations in the public service. The excerpt cited above explicitly mentions the labour relations context. One can reasonably say that labour relations legislation

and pension plans pursue different purposes . There is nothing indicating that the Supreme Court wanted to impose a blanket prohibition on the use of the private law test in order to recognize the existence of an employment relationship involving the government in any context. On this point, it should be noted that, when assessing private law criteria, one must take into consideration the purpose of the statute or rule of law that one considers applying. Christie's *Employment Law* states the following at paragraph 2.2:

> The point cannot be over-emphasized that, even more obviously than at common law, the purpose of the particular statute should and generally does determine whether or not a given relationship falls within its scope. It follows that precedents arising under the common law or under a particular statute can legitimately be rejected or modified when the question of "employee" status is asked for a different purpose.

[46] Second, I note that the case law of the Federal Court of Appeal and of our Court that considers the application of the rule in *Econosult* to pensions also does not mandate one single answer.

[47] The issue was before the Federal Court of Appeal in two cases: *Cohen v Canada (Attorney General)*, 2009 FCA 99 [*Cohen*], and *Public Service Alliance of Canada v Canada (Attorney General)*, 2009 FCA 6 [the *Mint* case]. As noted by the Attorney General, the hiring of employees by the Law Reform Commission or the Royal Canadian Mint, respectively, was governed by specific provisions of these two bodies' enabling statutes. It is not unreasonable to limit the authority of those precedents to the specific statutes that were at issue. In addition, in the *Mint* case, the Federal Court of Appeal also noted that a review of the factual situation did not establish that there was an employment relationship. In *Cohen*, the trial decision (2008 FC 676) had stated that both interpretations of the provisions at issue were reasonable. As I

mentioned above, the precedential value of such a decision is limited. When the matter was before the Court of Appeal, Mr. Cohen seemed to have conceded that he needed to prove that he had been "appointed" under the provisions of the *Law Reform Commission Act*. Thus, the Court of Appeal's brief comments on *Econosult* must be read in light of that concession and do not necessarily mean that the private law test for proving an employment relationship cannot apply to the PSSA.

[48] Three other decisions of our Court, which were not appealed, also deal with this issue. In the first one, *Burley v Canada (Attorney General)*, 2008 FC 525, it was held that *Econosult* prevented a "de facto employee" from receiving a pension. In two more recent cases, *Baribeau* and *Landriault*, our Court came to the opposite conclusion.

[49] In my view, when read together, these decisions do not render unreasonable the Pension Centre's policy whereby a pension may be granted to a person who shows that he or she had a *de facto* employment relationship with the government.

C. *Is the Pension Centre's decision reasonable?*

[50] I can now deal with the central issue between the parties: was it reasonable for the Pension Centre to conclude that Mr. Céré did not actually have an employment relationship with the government, except for the period from January 1 to June 30, 1995?

[51] The Pension Centre's decision may be summarized as follows. It begins with a summary of the evidence provided by Mr. Céré and describes the steps taken to locate the contracts

between Calian Technology Ltd. and the government. An analysis of the main provisions of the four contracts that could be found is provided in an appendix, and it is stated that it was reasonable to assume that similar contracts were in force during the entire period when Mr. Céré worked at the Laboratory. With respect to the period from January 1 to June 30, 1995, the Pension Centre noted that Mr. Céré had been [TRANSLATION] "treated differently than what was prescribed in the contracts" because his tasks had been modified without obtaining prior approval from Calian Technology Ltd. With respect to the earlier period, the decision is a rebuttal of Mr. Céré's main arguments based on the finding that the situation described by Mr. Céré was exactly the one provided for in the contracts. I will give two examples of this, where the restatement of Mr. Céré's argument is shown in bold and the Pension Centre's response is not bolded:

> [TRANSLATION]
>
> **You had to use DFL's equipment; the government provided training for you to use it, and you were supervised in the same way as public servants, by public servants.**
>
> We note that these factors are provided for in the contracts between Calian and the government that we have examined.
>
> **All of the tools and equipment were provided by the government.**
>
> We note that the fact that the tools and equipment had to be provided was implied by the fact that all of the work took place on DFL premises.

[52] The Pension Centre thus concluded that Mr. Céré had no employment relationship with the government and could not receive a pension under the PSSA for the period under consideration.

[53] The reasoning adopted by the Pension Centre is a complete perversion of the test for establishing an employment relationship. It should be noted that the purpose of this test is to determine whether a genuine employment relationship exists beyond the formal legal relationships that the parties put in place. Therefore, we cannot rely on those formal relationships to conclude that the test is not met: that is circular reasoning. Giving paramount importance to formal relationships will always lead to the conclusion that there is no employment relationship.

[54] When the parties entered into a contract that has the appearance of a contract for services, the terms and conditions of the contract must be examined to verify whether they establish a relationship that can genuinely be described as an employment relationship. The actual relationship also has to be examined to determine whether, despite the terms of the contract, a genuine employment relationship exists between the parties. If a review of the contract and the reality shows the existence of an employment relationship, the fact that the parties acted in accordance with the contract is not a bar to such a conclusion.

[55] Moreover, the position adopted by the Pension Centre leads to absurd results. It rewards breach of contract. It even allows the parties to manipulate the result of the exercise by drafting a contract that does or does not reflect reality depending on the desired result. In this case, the Pension Centre concluded that Mr. Céré had an employment relationship with the Laboratory for the period from January 1 to June 30, 1995, because, during that period, the Laboratory management had assigned him to duties that were not specified in the contract with Calian Technology Ltd. I must confess that I have difficulty understanding how that distinction is relevant to the proof of an employment relationship.

[56] In trying to justify the Pension Centre's decision, the Attorney General relied on the Federal Court of Appeal's decision in *1392644 Ontario Inc (Connor Homes) v Canada (National Revenue)*, 2013 FCA 85 [*Connor Homes*]. He claimed that that decision, as well as that Court's previous decisions, established a two-step approach. Based on that approach, we would first have to examine the subjective intention of the parties, as evidenced by the contract, before examining the objective reality of the relationship. According to the Attorney General, if the subjective intention is to conclude a contract for services, the analysis should stop at the first step.

[57] The Attorney General is mistaken about the scope of *Connor Homes*. The Federal Court of Appeal never meant to say that the analysis of the terms of the contract could be determinative or that the factual reality can be disregarded. On the contrary, it ruled that it is for the courts to determine the existence of an employment relationship and that the parties could not settle the question through the contract. The following excerpt from *Connor Homes*, at paragraphs 36–37, is a complete answer to the Attorney General's contention:

> However, properly understood, the approach set out in *Royal Winnipeg Ballet* simply emphasises the well-know [*sic*] principle that persons are entitled to organize their affairs and relationships as they best deem fit. The relationship of parties who enter into a contract is generally governed by that contract. Thus the parties may set out in a contract their respective duties and responsibilities, the financial terms of the services provided, and a large variety of other matters governing their relationship. However, the legal effect that results from that relationship, *i.e.* the legal effect of the contract, as creating an employer-employee or an independent contactor [*sic*] relationship, is not a matter which the parties can simply stipulate in the contract. In other words, it is insufficient to simply state in a contract that the services are provided as an independent contractor to make it so.
>
> Because the employee-employer relationship has important and far reaching legal and practical ramifications extending to tort law (vicarious liability), to social programs (eligibility and financial contributions thereto), to labour relations (union status) and to

> taxation (GST registration and status under the *Income Tax Act*), etc., the determination of whether a particular relationship is one of employee or of independent contractor cannot simply be left to be decided at the sole subjective discretion of the parties. Consequently, the legal status of independent contractor or of employee is not determined solely on the basis of the parties [*sic*] declaration as to their intent. That determination must also be grounded in a verifiable objective reality.
>
> [Emphasis added.]

[58] I also note that, in that case, the Court of Appeal stated that the reality did not correspond to the stated intention of the parties (that is, the characterization that they tried to give to their contract) and found that an employment relationship existed.

[59] Relying on *Baribeau*, the Attorney General also alleges that the private law test, as it is worded in common law, puts more emphasis on the subjective intention of the parties than in civil law. I confess that I have difficulty understanding this argument. Both in civil law and in common law, the purpose of developing a method to determine the existence of an employment relationship is precisely to keep in check the parties' intention to hide the reality. In any case, the specificity of the civil law test, if there is any, is to give more weight to the presence of a relationship of subordination. It is difficult to see how this could be determinative in this case.

[60] Taking a broader view, we must also consider the purpose of the PSSA. The purpose is to ensure public servants' financial security when they retire. This is a protection granted to a certain category of workers. The PSSA also specifies that all eligible employees must contribute to the plan. In short, Parliament's intention is that membership in the plan is mandatory. It is thus even more important to ensure that a government entity cannot impose on a worker a legal

framework that would strip him or her of that protection. However, in this case, there is every indication that the Laboratory wanted to hire Mr. Céré as an employee and treated him as such for the ten years that he worked there, but that, apparently to avoid certain administrative constraints, it put in place a tripartite relationship involving certain private businesses that were prepared to play that part.

[61] For all of these reasons, I am of the view that the Pension Centre's decision was unreasonable.

D. *Legitimate expectation*

[62] Given my finding that the Pension Centre's decision was unreasonable, I do not need to consider whether the communications between the Pension Centre and Mr. Céré gave rise to a legitimate expectation. I will simply say that, in Canadian administrative law, the legitimate expectations doctrine does not create substantive rights: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 26.

III. Conclusion

[63] Since the Pension Centre's decision is unreasonable, the application for judicial review is allowed.

[64] When an application for judicial review is allowed, the usual remedy is to refer the matter back to the decision-maker so it can render a new decision. Mr. Céré did not ask me to make an

exception to that practice. These reasons should, however, leave no doubt as to the decision that should be rendered.

[65] Given that the Pension Centre's decision will a have significant impact on Mr. Céré's life choices, I would urge the Pension Centre to give priority to the processing of his application.

JUDGMENT in T-2010-17

THIS COURT'S JUDGMENT IS that

1. the application for judicial review is allowed;

2. the matter is referred back to the Government of Canada Pension Centre for a new decision to be rendered;

3. the respondent is ordered to pay the costs of the applicant.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2010-17
STYLE OF CAUSE:	JOCELYN CÉRÉ v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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